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No. 79-30

In the Supreme Court of the United States

OCTOBER TERM, 1978

BEN KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In this criminal tax case, petitioner seeks review of the decision below holding that his motion for a new trial and his notice of appeal from the district court's denial of the motion were untimely.

The pertinent facts are undisputed and may be summarized as follows: After a trial to a jury in October 1973, in the United States District Court for the District of Colorado, petitioner was convicted of income tax evasion in violation of 26 U.S.C. 7201. The court of appeals affirmed (35 A.F.T.R.2d 75-1284), and this Court denied certiorari (423 U.S. 827 (1975)). On October 21, 1975, the court of appeals' mandate was entered on the docket of the district court (Pet. App. A-2; Pet. 3).

In February 1978, petitioner filed a motion under Rule 33, Fed. R. Crim. P., to set aside the judgment and for a new trial based on newly discovered evidence. The district court denied the motion on April 12, 1978, on the ground that it was untimely because Rule 33 requires that such a motion must be filed "within two years after final judgment," and on the further ground that the alleged newly discovered evidence was not in fact evidence. However, no notice of the entry of the order was mailed to counsel as provided by Rule 49(c), Fed. R. Crim. P. (Pet. App. A-2). Counsel for petitioner did not discover the entry of the April 12 order until October 1978, following an inquiry to the district court clerk's office. Thereafter, on November 2, 1978, petitioner filed a motion to vacate the April 12 order together with a notice of appeal from the district court's denial of the first motion. The district court denied petitioner's motion on the ground that it was without power to vacate its April 12 order (Pet. App. A-2 to A-3).

The court of appeals affirmed (Pet. App. A-4). It held that petitioner's motion for a new trial was untimely and that the district court correctly held that it had no jurisdiction to enlarge the time within which a notice of appeal could be filed (Pet. App. A-3).

1. The decision below correctly held that petitioner's motion for a new trial was untimely.[1] Rule 33 of the Federal Rules of Criminal Procedure provides that a motion for a new trial based on newly discovered evidence must be made within two years of the entry of final judgment. The date of a final judgment is the last date for

[1]The district court also correctly held that evidence that petitioner alleged to be newly discovered was in fact not evidence (Pet. App. A-2). An examination of the allegations contained in petitioner's motion shows that they focused entirely on challenging the materiality and substantiality of the evidence and the credibility of the witnesses at trial (Pet. App. C-1 to C-20).

taking an appeal if no appeal is taken; if, as here, an appeal is taken, the two-year period runs from the date of issuance of the mandate of affirmance by the court of appeals. See, *e.g.*, *United States* v. *White*, 557 F. 2d 1249 (8th Cir.), cert. denied, 434 U.S. 870 (1977); *United States* v. *Granza*, 427 F. 2d 184 (5th Cir. 1970); *Smith* v. *United States*, 283 F. 2d 607 (D.C. Cir. 1960) (Bazelon, J., concurring); *United States* v. *Rojas*, 574 F. 2d 476 (9th Cir. 1978). Contrary to petitioner's argument (Pet. 5-7), the date of a final judgment for purposes of Rule 33 is the date the mandate issues and not the date of final sentence under 18 U.S.C. 4208(b).[2] *Casias* v. *United States*, 337 F. 2d 354 (10th Cir. 1964); *United States* v. *White*, *supra*. See 2 C. Wright, *Federal Practice and Procedure: Criminal* § 558 (1969).

Here, petitioner did not file his motion for a new trial until February 8, 1978, more than two years after the mandate of affirmance was entered on the docket of the district court on October 21, 1975 (Pet. App. A-4). The time for filing the motion could not be enlarged. Rule 45(b), Fed. R. Crim. P. Thus, petitioner's motion was not timely and could not be considered by the district court. *United States* v. *Smith*, 331 U.S. 469 (1947); *United States*

[2]*United States* v. *Behrens*, 375 U.S. 162 (1963), *Corey* v. *United States*, 375 U.S. 169 (1963), and *Berman* v. *United States*, 302 U.S. 211 (1937), upon which petitioner relies (Pet. 5-6), are distinguishable. The question presented in *Behrens* was whether the defendant and his attorney should be present at final sentencing under Rule 43, Fed. R. Crim. P. In *Corey*, the Court held that for purposes of the predecessor of Rule 4(b), Fed. R. App. P., when a defendant is sentenced under 18 U.S.C. 4205(c), the defendant may take an appeal "after either the first *or* the second sentence" (375 U.S. at 173; (emphasis in original). Here, petitioner took an appeal after the first sentence and the finality of that appeal is controlling. See 375 U.S. at 174. *Berman* is likewise inapposite. It involved the question whether an appeal was interlocutory.

v. *Beran*, 546 F. 2d 1316 (8th Cir. 1976), cert. denied, 430 U.S. 916 (1977).

2. In view of the palpable untimeliness of petitioner's new trial motion, which is established by uncontroverted docket entries, there is no need to consider the issue of the jurisdiction of the district court to vacate its order denying the motion. In any event, the decision below correctly held that the district court had no jurisdiction to vacate its order denying the motion for a new trial. Rule 26(b), Fed. R. App. P., provides that a court may not enlarge the time for filing a notice of appeal. It is well settled that the taking of an appeal within the time prescribed in Rule 4(b), Fed. R. App. P., is mandatory and jurisdictional. *United States* v. *Robinson*, 361 U.S. 220 (1960); *Berman* v. *United States*, 378 U.S. 530 (1964); *Browder* v. *Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978).

Petitioner urges (Pet. 7-11) that the decision below should have followed the rationale of cases in which, because the clerk had failed to give notice of entry of judgment as required by Rule 77(d), Fed. R. Civ. P., the courts vacated the judgment under Rule 60(b) of those rules. But whatever the rule may be with respect to civil cases, Rule 49(c) of the Federal Rules of Criminal Procedure explicitly provides that lack of notice of an entry of an order from the clerk does not affect the time to appeal or authorize the court to relieve a party for failure to appeal within the time allowed.[3]

[3]Compare *Hill* v. *Hawes*, 320 U.S. 520 (1944); *Rosenbloom* v. *United States*, 355 U.S. 80 (1957), *Carter* v. *United States*, 168 F. 2d 310 (10th Cir. 1948), and *Lohman* v. *United States*, 237 F. 2d 645 (6th Cir. 1956). Those decisions are no longer authoritative after the amendment of Rule 49(c) and the related amendment of Fed. R. Civ. P. *United States* v. *Stolarz*, 547 F. 2d 108, 110-111 n.2 (9th Cir. 1976), cert. denied, 434 U.S. 851 (1977). See also 3 C. Wright, *Federal Practice and Procedure: Criminal* § 823 (1969).

At all events, it is settled that the court's failure to notify a party, standing alone, is not sufficient to warrant relief under Rule 60(b). *E.g.*, *Kramer* v. *American Postal Workers Union, AFL-CIO*, 556 F. 2d 929 (9th Cir. 1977); *Mizell* v. *Attorney General of New York*, 586 F. 2d 942 (2d Cir. 1978). See 16 C. Wright, A. Miller, E. Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 3950 (1979 Supp.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE JR.
Solicitor General

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